No. 20,429

IN THE

United States Court of Appeals

For the Ninth Circuit

HUDSON WATERWAYS CORPORATION,
Appellant,

vs.

WILLIAM J. SCHNEIDER,
Appellee.

APPELLANT'S OPENING BRIEF

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTION

Jurisdiction of this Court exists by virtue of 28 U.S.C. §1291 and a Notice of Appeal filed on July 9, 1965 (R. 82)[1] from a Final Decree (R. 79) in Admiralty entered in the United States District Court for the Northern District of California on May 14, 1965.

The District Court had jurisdiction, under 28 U.S.C. §1333, by virtue of a seaman's libel (R. 1) for damages under the Jones Act (46 U.S.C. §688) and the General Maritime Law.

[1]Since the Record on Appeal is composed of a volume of the Clerk's Record (Volume I) and four volumes of Reporter's Transcript (Volumes II-V) with separate pagination not continuous with the Clerk's Record, we have designated the references with "R." for the Clerk's Record, and "Tr." for the Reporter's Transcript.

STATEMENT OF THE CASE

William J. Schneider, a seaman and licensed marine engineer, commenced this action by filing a Libel (R. 1) against his former employer, Hudson Waterways Corporation, for damages, claiming to have been injured by an electrical shock while attempting to repair an electric air compressor in the line of his duties as an engineering officer aboard the SS TRANSORLEANS. After trial a decree was entered in favor of Schneider in the amount of $40,427, with interest and costs (R. 79-80) from which the Respondent has appealed (R. 82).

In the following account of the incident, except where otherwise indicated, we rely upon the evidence given by Schneider himself.

Schneider was employed as Third Assistant Engineer aboard the SS TRANSORLEANS from January 15, 1964 until February 14, 1964 (Finding 4, R. 68; Tr. 8) and was the watch officer on the 8:00 to 12:00 watch (Finding 5, R. 68; Tr. 12). About noon on January 27, 1964 Schneider was told by the First Assistant Engineer to find out what was wrong with the stand-by air compressor, which had stopped running, and get it going again (Finding 5, R. 68; Tr. 12-13). Schneider was qualified to undertake the repair of an air compressor unit of this type (Tr. 80). The air compressor was generally familiar to him (Tr. 80, 88) and the particular portion of the unit from which he received a shock was described by him as "standard equipment" (Tr. 88).

The first thing he did when he got to the unit was to note that somebody had pulled the circuit breaker and his first act was to put power to the unit by closing the cir-

cuit breaker (Tr. 15, 98). The next thing he did was to try to start the unit by manipulating the manual starting switch or "trigger" (Tr. 15, 99), which protruded from an enclosed box (Tr. 16) referred to as a pressure regulator (Tr. 96, 97), located at the base of the unit (Tr. 88). As he reached for this switch he noticed that the regulator box had in some manner been loosened from the frame and was tilted on its base so that it hung by its electrical wires and he attempted to steady it with his left hand while he turned on the switch with his right hand (Finding 5, R. 69; Tr. 16, 280, 281). As he did so he received an electric shock (Finding 5, R. 69; Tr. 16). When Schneider proceeded with the repair of the unit he opened the regulator box and found some bare wires touching the inside of the box, as a result of the box's being tilted off its mounting. This condition was evidently responsible for the breakdown of the compressor as well as the electrical shock and when Schneider repaired it the compressor was restored to operation (Finding 8, R. 70; Tr. 18-20).

As a part of Schneider's routine duties, he had made several inspection tours to check engine room equipment during each watch (Tr. 278). Each tour would normally include the air compressor unit and he made at least one such tour during his 8:00 to 12:00 watch on January 27, 1965 (Tr. 279). He found nothing wrong with the air compressor unit (and particularly the pressure regulator) at any time during the voyage, either operationally or through observation (Tr. 12, 279, 281) prior to being told by the First Assistant Engineer that something was wrong.

The record contains no evidence at all as to the following:

(1) How the condition of the box came about or that it existed for any length of time prior to its being called to Schneider's attention;

(2) Any inspections of the equipment by anyone other than Schneider which might have disclosed the condition, or

(3) Violation of any practice or other standard of care regarding maintenance or inspection which would have disclosed the condition to others at an earlier time.

Upon this record the District Court held the vessel unseaworthy, extending the warranty of seaworthiness to the very equipment and condition which a skilled seaman is assigned to repair for the explicit reason that it is not working, and went on to hold Respondent negligent, upon the ground that it maintained the regulator box unsecured to the air compressor unit and that this defective condition of the box which, combined with the wiring inside, produced the shock, was known or should have been known to Respondent in the exercise of ordinary care (Finding 8, R. 70). At the same time the Court absolved the Libelant, the only qualified person shown to have conducted inspections of the compressor, of any contributory negligence (Finding 10, R. 70).

QUESTIONS PRESENTED

1. Should the warranty of seaworthiness be extended to embrace equipment which is known and represented to be unfit on account of damage and to a condition which the injured officer, qualified to do so, was directed to find and repair?

2. Is the shipowner liable on the ground of negligence with respect to the condition of equipment where there is no showing as to how the condition came about and no showing that the owner had or should have had knowledge of the condition through anyone other than the very officer claiming injury?

3. Is an officer free of negligence where the Court finds that the injury of which he complains arose from negligent failure to discover and correct a condition and the evidence fails to show that anyone other than he inspected the equipment or had the duty to do so?

SPECIFICATION OF ERRORS

The following errors are relied upon by Appellant:

1. The District Court erred in holding that the vessel's warranty of seaworthiness extended to the Libelant, with respect to the conditions found defective in this case to which the Libelant was exposed by reason of his having to find and repair such conditions, and the Court therefore erred in finding the vessel unseaworthy as to the Libelant.

2. The District Court erred in finding and holding Respondent liable to Libelant on the ground of negligence

in the absence of evidence of negligence on the part of anyone other than Libelant himself and, specifically, in the absence of evidence of any requirement of maintenance or inspection, apart from the inspections conducted by the Libelant himself, which might have led to the discovery of the defective condition.

3. The District Court erred in finding and holding the Libelant free of contributory negligence, in view of the Court's having found that the condition complained of arose from negligence and of the Court's having so found upon evidence not sufficient to show negligence of anyone but the Libelant.

SUMMARY OF ARGUMENT

I. Appellee in this case was injured in the course of finding and repairing the cause of a breakdown and as a result of precisely the condition which he was, in accordance with his duties as an engineering officer, engaged in finding and repairing. As he was engaged to do this work and was told, and had himself ascertained, that the equipment involved was unseaworthy, rather than seaworthy, the extension of the warranty of seaworthiness to him in this matter is a contradiction in terms which is wrong in principle, as contrary to the nature of a warranty and to the criterion of reasonableness which governs the warranty of seaworthiness, and is in conflict with the judicial precedents which have all recognized this principle.

II. The finding of negligence in this case is based upon an alleged duty of inspection, discovery and maintenance. Appellee had the burden of proving the standard of care

to be applied and its violation but there was no evidence presented showing any standard of inspection, discovery and care which had been violated and the only evidence with respect to such matters was the affirmative evidence of Appellee that he himself, in the line of his duties, made inspections of the equipment as late as the forenoon of the day in which he was injured and found nothing wrong. In this state of the evidence, the only person whose activities could support the finding of negligence was Appellee himself, and the finding of negligence must be based upon his own improper performance of duty. But liability under the doctrine of *respondeat superior* does not extend to liability for the negligence of the injured man himself, and it was therefore wrong to hold the vessel liable on this basis.

III. As the record was such that the finding of negligence must be based upon the performance of Appellee himself, it was manifestly erroneous to find that he had not been contributorily negligent and, as his negligence involved the failure to perform a supervisory duty to his employer, rather than merely inattention to his own safety, it is the kind of negligence which, under established doctrine, does not merely reduce damages but bars recovery completely.

in the absence of evidence of negligence on the part of anyone other than Libelant himself and, specifically, in the absence of evidence of any requirement of maintenance or inspection, apart from the inspections conducted by the Libelant himself, which might have led to the discovery of the defective condition.

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ARGUMENT

I

THE WARRANTY OF SEAWORTHINESS IS NOT AN UNDERTAKING THAT A REPAIR JOB WHICH AN ENGINEER IS ENGAGED TO DO WILL NOT NEED TO BE DONE

The findings, amplified by Schneider's testimony, show that he inspected and, when necessary, repaired the compressor and that as part of his duties he received a shock as a result of the very condition which had caused the compressor to stop running and which he had been sent, in his duty as an engineering officer, to find and repair (Findings 5, 6 and 8, R. 69-70; Tr. 18-20, 278-279). Because of the existence of the damage which Schneider was sent to repair, the District Court has held the vessel unseaworthy, despite the fact that the equipment in question was not represented or held out as being fit but, on the contrary, was represented and known to all concerned to be unfit, and despite the fact that it was a portion of the equipment which the Appellee, as a skilled engineer, was hired to keep fit and to repair when it should be unfit.

The District Court has thus held that the warranty of seaworthiness amounts to an undertaking that a repair job which an engineer is engaged and paid to do will not need doing. In so holding, the Court has run counter to the principles involved in the warranty of seaworthiness. Both reason and authority are overwhelmingly to the contrary.

Appellant does not deny its duty to furnish a vessel and appurtenances reasonably fit for their intended service, as set forth in *Mitchell v. Trawler Racer,* 362 U.S. 539, 1960 A.M.C. 1503, but "[t]he mere fact that a seaman has been ordered to do a dangerous thing does not estab-

lish a case of unseaworthiness." *Bruszewski v. Isthmian Steamship Co.,* 163 F. 2d 720, 722, 1947 A.M.C. 899, 901 (3d Cir.). Appellant does not dispute the proposition that a defective compressor regulator may amount to an unseaworthy condition in certain circumstances. What Appellant does challenge is the applicability of the warranty of seaworthiness under the circumstances presented by this case, for the warranty of seaworthiness is not a warranty that the ship or gear is absolutely fit in all events, but only reasonably so, depending upon the circumstances. The key to the applicability of the warranty of seaworthiness is reasonableness.

It is quite obviously not reasonable to construe the warranty of seaworthiness to apply to that which is expressly represented as unfit for service and requiring attention. To do so is a contradiction of the very term "warranty", which characterizes the obligation. This principle has been clearly recognized and applied by the Supreme Court, in *West v. United States,* 361 U.S. 118, 121-122, 1960 A.M.C. 15, 17-18 (1959). There the vessel was in the shipyard for overhaul and a workman was injured, not as in the present case by the very condition which he was to repair, but as a result of another faulty condition in the vicinity. The Supreme Court pointed out that the purpose of the vessel's being in the yard was to make her seaworthy, that the condition which had caused the injury was included in the specifications for repair, that the representations of the repair contract specifications showed that she was not seaworthy and, therefore, that "[i]t would be an unfair contradiction to say that the owner held the vessel out as seaworthy . . ." Thus the

Supreme Court plainly recognized the element of representation, or holding out, in the warranty of seaworthiness and acknowledged that the warranty did not apply where the unfitness was known and the condition was held out not as one of fitness but as one of unfitness and needing repair.

Logically considered, "[l]iability for an unseaworthy vessel should obtain only where the individual affected is entitled to rely, and does rely, upon the seaworthiness of something actually unseaworthy." *Bruszewski v. Isthmian Steamship Co.,* 163 F. 2d 720, 722, 1947 A.M.C. 899, 901 (3d Cir.). In the *Bruszewski* case certain longshoremen were called upon to assist the crew in removing a broken boom from the vessel. In the process a loose block suspended in the rigging dropped upon one of the longshoremen, injuring him. The longshoreman claimed damages on the grounds of negligence and unseaworthiness. The Court considered that the broken boom presented an obvious danger to those engaged in removing it and refused, as a matter of law, to apply the warranty of unseaworthiness in this situation, saying: "To state that a broken boom is warranted as seaworthy would require distortion of the meaning generally awarded those terms."

In *Byars v. Moore-McCormack Lines, Inc.,* 155 F. 2d 587, 1946 A.M.C. 985 (2d Cir.), the plaintiff fell through a defective hatch which he had been sent to assist in repairing. The Court of Appeals rejected his claim, stressing the plaintiff's knowledge of the defect and that the very fact of its existence was the reason for his presence and stating:

> "An employee cannot recover for injuries received while doing an act to eliminate the cause of the injury. . . . 'The reason for this exception to the general rule is that it would be manifestly absurd to hold a master to the duty of providing a safe place when the very work in which the servant is engaged makes it unsafe.' "[2]

In *McDaniel v. The Lisholt,* 257 F. 2d 538, 540, 1958 A.M.C. 1832, 1835 (2d Cir.), a fireman who boarded the vessel to put out a fire claimed the benefit of the warranty of seaworthiness and the Court quoted from *Byars v. Moore-McCormack Lines, Inc., supra,* and rejected his claim, stating:

> "[I]t is undisputed that the vessel was unseaworthy at the time libelant went aboard. He was stationed aboard the ship because of the vessel's unseaworthiness occasioned by the fire. There can be no duty to furnish a seaworthy ship to a fireman who was on the vessel knowing it to be unseaworthy, and was on board because of its unseaworthiness."

Accordingly, in *Pinto v. States Marine Corporation of Delaware,* 296 F. 2d 1, 1962 A.M.C. 104 (2d Cir.), where the plaintiff was injured as a result of the necessity of carrying a broken signal light somewhat awkwardly from the bridge to a workshop below to be repaired, while the issue of unseaworthiness was keenly contested on other grounds and the judgment for the shipowner was upheld, it was never suggested by very able counsel or an experienced Court that the broken light (which would constitute

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[2]Quoted from *Kowalsky v. Conreco Company,* 264 N.Y. 125, 190 N.E. 206 (1934).

unseaworthiness in other circumstances) could be made a basis for recovery.

In *Lieberman v. Matson Navigation Co.,* 300 F. 2d 661, 1962 A.M.C. 1281 (9th Cir.), a seaman sought damages for a fall on the deck, which he claimed was unseaworthy because it was covered with a soapy detergent which he had assisted in applying for the purpose of removing wax. The District Court refused to find unseaworthiness and this Court affirmed, stressing in its opinion the seaman's participation in, and therefore knowledge of, the condition of which he complained.

In *Maiden v. United States,* 253 F. 2d 953, 1958 A.M.C. 1362 (9th Cir.), the libelant had been injured when he was struck by a heavy wave which came over the bow of the ship while he was carrying out an inspection of concrete plugs in the hawse pipes, which had suffered breakage in heavy weather. Obviously, such breakage would have rendered the vessel unseaworthy as to seamen in other circumstances, but the District Court declined to hold the vessel liable for unseaworthiness in these circumstances and this Court affirmed.

In *Pinion v. Mississippi Shipping Co.,* 156 F. Supp. 652, 656, 1957 A.M.C. 2308, 2312 (E.D.La.), as here, the libelant claimed to recover for the defective condition of the very thing which he was engaged in repairing, and the Court said:

> "Here libellant, a ship repair man, was aboard the vessel to replace pipe which was wasting away under the corrosive influence of salt water. He knew the pipe had outlived its usefulness, hence its replacement. Under these circumstances, the shipowner did

not warrant the seaworthiness of the pipe or of the vessel in respect to the pipe. *Bruszewski v. Isthmian S.S. Co., supra; Byars v. Moore-McCormack Lines, supra.* Quite the converse. By paying Pinion's employer to replace it, the shipowner in effect warranted that the pipe was unseaworthy, that it should not be relied on, that it was dangerous. Under the circumstances, it would be absurd to hold that the vessel herself was unseaworthy and that her owner is liable in damages because of defective pipe which libellant was brought aboard to replace."

To the same effect, although without discussion, is *Raidy v. United States,* 153 F. Supp. 777, 781, 1957 A.M.C. 1852, 1858 (D.Md.) aff'd on opinion of D.C., 252 F. 2d 117, 1958 A.M.C. 1328 (4th Cir.), where the Court said,

> "It seems to me a misnomer to speak of the removable and absent footplate as 'unseaworthiness of the ship.' The removal of the absent plate, for the substitution of others, was a part of the work required to be performed by the contract specifications."

The different verbal approaches of the courts in applying the doctrine of unseaworthiness in these cases is unimportant. The basic proposition underlying them all is perfectly valid. It is that where a person otherwise entitled to the warranty of unseaworthiness is aware that an appurtenance is broken or malfunctioning and is sent to repair or correct it, the shipowner cannot be said to warrant that particular item as reasonably fit for its intended use and the person cannot be said to rely on such a warranty when he knows that the item is not fit.

Once the shipowner and the seaman are both aware that an appurtenance is not functioning properly, it is a *non-sequitur* to claim that the warranty of seaworthiness still applies. At this point, the shipowner has knowledge of the improper condition and should take steps to correct it. Its action or inaction must thereafter be gauged by customary negligence standards. To place the shipowner at the peril of being absolutely liable for any injury incurred by a seaman while fixing an obviously faulty condition would be "absurd," as the Court said in *Pinion*,—"an unfair contradiction," as the Supreme Court said in *West*.

Often repairs must be accomplished at sea while working under difficult and perhaps dangerous conditions. To apply a standard of absolute liability in such a situation tends to discourage prompt repair at a time when it might be imperative that this work be accomplished in order to avoid exposing the crew and the ship to further hazards. Depending upon the circumstance, the shipowner may be obligated to take greater than ordinary precautions in assigning the work, clearing the area and providing necessary assistance and tools, but the shipowner cannot, as either a logical or a practical matter, be said to warrant the fitness of equipment that is plainly asserted to be malfunctioning.

II

THE SHIPOWNER IS NOT LIABLE FOR NEGLIGENCE WHICH IS NOT SHOWN TO BE THAT OF ANYONE BUT THE LIBELANT

Under the Jones Act, the plaintiff must bear the burden of going forward with evidence on all the essential elements of a negligence action. He must prove the existence of a duty, the negligent violation of that duty by the defendant and a causal relationship of the violation to the injury sustained. *Lind v. American Trading & Production Corp.,* 294 F. 2d 342, 347, 1961 A.M.C. 2467, 2475 (9th Cir.).

In determining that Appellant was negligent, the District Court did not mention in its Memorandum Opinion (R. 66) the nature of the duty owed by Appellant to Appellee. From Finding 8 (R. 70), however, it would appear that the duty involved was the proper maintenance of the ship's auxiliary air compressor unit (hereafter referred to as the "compressor").[3] Finding 8 indicates that this accident occurred as a result of negligent failure to discover and correct the condition of the pressure regulator portion of the compressor unit by proper maintenance. The duty to discover the condition involves inspection and a failure of adequate inspection is indicated by the language in Finding 8 to the effect that

[3]Finding 8 also suggests that Appellant is liable for its failure to provide Appellee with a safe place to work, in that the equipment in question proved incapable of performing its function in the manner for which it was designed. Failure to provide a safe place to work does not afford an independent ground for the recovery of damages. Where a particular area is made unsafe, liability can only be predicated upon proof of the shipowner's failure to exercise reasonable care in that regard. *West v. United States,* 361 U.S. 118, 1960 A.M.C. 15 (1959).

the condition, "in the exercise of ordinary care should have been known to respondent."

There is no evidence whatever in the record to indicate that Appellant failed to maintain and inspect this compressor or any portion of it through any person other than Appellee Schneider. The record contains no comment regarding the procedure for the upkeep of the compressor and there is no indication that anything was wrong with it at any time during the voyage prior to the noon hour of January 27, 1964, the date of this accident. No evidence was introduced to the effect that proper inspections of the compressor were not undertaken or that, had they been undertaken, the cause of the malfunction would have been discovered. No evidence was introduced as to what inspections or maintenance procedures were "usual or customary or required by good practice or by law or regulation."[4]

The only testimony concerning the inspection and maintenance of the compressor came from Schneider himself. As a part of his routine duties he made inspection tours to check engine room equipment (Tr. 278). Each tour would normally include the compressor unit and he made at least one such tour during his watch on January 27, 1964 (Tr. 279). He found nothing wrong with the compressor unit, and particularly the pressure regulator (Tr. 281), that day or at any other time during the voyage (Tr. 12, 278, 279). The first indication Schneider had that the compressor was not functioning properly came at noon on January 27, 1964, when the first assistant

[4]*The Belgrano*, 299 F. 2d 897, 904, 1962 A.M.C. 1327, 1336 (9th Cir.).

engineer informed him that the compressor had stopped running and asked him to find out what was wrong with it (Tr. 12, 13).

The timing of the discovery of this malfunction is significant in evaluating the District Court's finding of negligence. Schneider inspected the compressor during the 8:00 to 12:00 watch on January 27 and found nothing wrong with it (Tr. 279); yet between the time of his inspection and 12:00 noon, when he went off watch, the compressor stopped running (Tr. 12, 13). If the condition had arisen prior to his inspection this would indicate that Schneider's inspection was not adequate; otherwise, the cause of the malfunction would have been detected. If this is so, the shipowner's negligence in failing properly to inspect is only commensurate with Schneider's own negligence and the shipowner's liability, if any, would arise directly as a result of Schneider's substandard performance.

If the condition giving rise to the malfunction occurred between the time of Schneider's inspection and noon on January 27, 1964, Appellee can hardly be guilty of improper maintenance, given the short interval of time involved, particularly when the malfunction was not detected by the engineer (Schneider) on duty at the time.

Even in applying the doctrine of comparative negligence, libelant cannot recover from the shipowner where the only negligence proved was his own negligence. *Guarracino v. Luckenbach Steamship Co.,* 333 F. 2d 646, 1964 A.M.C. 2240 (2d Cir.); *The Benny Skou,* 346 F. 2d 993 (2d Cir. 1965).

The negligence issue in this case is like that in *The Belgrano,* 299 F. 2d 897, 1962 A.M.C. 1327 (9th Cir.) where this Court reversed the District Court's finding of negligence. *The Belgrano* involved a longshoreman's injury from a defect of ship's gear which was plainly visible on inspection, and was actually discovered by longshoremen the previous day. The District Court found that the shipowner had a duty to make a reasonable inspection of the ship's gear and equipment to see that it was operating properly, and that this duty had been breached. In reviewing the record, this Court found that the libelant established the following propositions: (1) that the accident occurred, (2) that it occurred because of a malfunction in ship's gear and (3) that the stevedores discovered the malfunction shortly before the accident. 299 F. 2d, at 904, 1962 A.M.C. at 1336. Precisely the same situation is presented by the record in this case, except for the immaterial difference that here the malfunction was discovered much closer to the time of the accident and by a member of the crew.

In *The Belgrano,* this Court stated that it could not be inferred from the record that reasonable inspection by the vessel would have revealed the cause of the malfunction:

> "The vice of [the libelant's] argument is the absence from the record of any testimony establishing, or tending to establish, the standard of conduct which respondents were required to meet in discharge of their duty to make a reasonable inspection to see that the gear and equipment furnished by them operated properly. There is no testimony in the record of what conduct on the part of operators and owners of ves-

> sels of the type or similar to the type of the BELGRANO and similarly equipped, was usual or customary or required by good practice or by law or regulation in making inspection of gear and equipment. Is the standard of conduct met by a visual inspection of the gear and equipment? Does the standard of conduct require an operational test of the gear and equipment of a vessel? Does the standard of conduct require constant inspection? Does the standard of conduct require daily inspection? Does the standard of conduct require inspection before and after each use of the gear and equipment? The record leaves us completely in the dark in attempting to find answers to these questions." 1962 A.M.C. at 1336; 299 F. 2d at 904.

These observations are equally applicable in this case, not only as to inspections, but also as to maintenance.

The mere fact that an accident occurred cannot support a finding of negligence. *West v. United States, supra; The Belgrano, supra.* The Jones Act does not make an employer responsible for acts which do not constitute a breach of duty to the seaman. *Hawley v. Alaska Steamship Co.,* 236 F. 2d 307, 311, 1956 A.M.C. 1877, 1883 (9th Cir.). And the seaman's own negligence is not such a breach of duty. *Guarracino v. Luckenbach Steamship Co., supra; The Benny Skou, supra.*

Thus, the record shows that the finding of negligence is based upon no evidence whatever of negligence on the part of anyone but Schneider himself, and the authorities show that the doctrine of *respondeat superior* has not been extended to the imposition of liability on that basis. For the reasons indicated above, the District Court's find-

ings with respect to Appellant's negligence cannot be supported on the record and must be set aside.

III

THE DISTRICT COURT ERRED IN FAILING TO HOLD AGAINST APPELLEE ON THE ISSUE OF CONTRIBUTORY NEGLIGENCE

The Court found negligence in this case (Finding 8, R. 70). From the foregoing discussion, it is apparent that Schneider was guilty of that negligence in failing to perform the expert and supervisory duties for which he was hired. In the face of this, it is clear the Court erred in finding Appellee "not guilty of contributory negligence" (Finding 10, R. 70).

The Court's negligence finding suggests that proper inspection would have resulted in a warning to Schneider which would, in turn, have resulted in his avoiding the shock. Yet the only evidence concerning inspection was that Schneider himself, in the course of his regular duties, conducted the inspections of the equipment. His failure to make an adequate inspection and discover the condition of the equipment was a breach of his regular duties to his employer, rather than mere inattentiveness to his own safety.

It is a long-established doctrine that negligence of the injured man in failing to carry out his responsibilities to his employer is a bar to recovery, as distinguished from mere attentiveness to his own safety, which is the only kind of contributory negligence contemplated under the provision of the Federal Employer's Liability Act (45

U.S.C. §53) providing that contributory negligence shall reduce the damages. *Great Northern Ry. Co. v. Wiles,* 240 U.S. 444, 448 (1916); *Davis v. Kennedy,* 266 U.S. 147, 149 (1924); *Bradley v. Northwestern Pacific R. Co.,* 44 F. 2d 683 (9th Cir. 1930).

As the Jones Act, 46 U.S.C. §688 operates by the incorporation of the Federal Employer's Liability Act, the same rule applies in seamen's cases, as held in *Walker v. Lykes Bros. Steamship Co.,* 193 F. 2d 772, 1952 A.M.C. 269 (2d Cir.). There the Court denied recovery to the master of the vessel for injuries resulting from a defective condition which he had known about for some time and which it was his duty to arrange to have repaired. The fact that the *Walker* case involved the master, rather than a lower ranking officer, is immaterial, since the essence of the case is the existence of responsibility for the task in the person claiming injury, and the F.E.L.A. cases upon which the doctrine rests abundantly show that it is not restricted to senior managerial employees.[5]

As it is clear that Schneider himself is involved in the negligence which the District Court found in this case and that his negligence was of the type involving a

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[5]The distinction between inattentiveness to one's own safety and failure to perform one's duty to his employer is that in the latter the employer has a separate cause of action against the officer involved. *States Steamship Co. v. Howard,* 180 F. Supp. 461, 1960 A.M.C. 1861 (Ore.) and authorities there cited. See, generally, Annotation, 110 A.L.R. 831 (1937). Where this claim is for damages resulting from injuries to another it is necessary to proceed by a separate suit, as in *States Steamship Co. v. Howard, supra,* or impleader, as in *Linday v. American President Lines,* 214 C.A. 2d 146, 29 Cal. Rptr. 465, 1963 A.M.C.

breach of his duty to Appellant, rather than merely a breach of his "duty" of safe conduct toward himself, and was, indeed, the only negligence of which there was evidence, the Court's finding that he was not guilty of negligence is erroneous and he is barred from recovery.

CONCLUSION

For the foregoing reasons, we submit that the Decree should be reversed with directions to enter a decree for Appellant.

Dated, San Francisco, California,
January 12, 1966.

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ALF R. BRANDIN,
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1899. In a case such as *Petition of Moore-McCormack Lines,* 164 F. Supp. 198, 1958 A.M.C. 1497 (S.D.N.Y.), it was necessary to proceed by cross-libels against the estates of the officers whose alleged negligence had caused the catastrophe, since the amounts claimed from the estates exceeded the amounts claimed by the estates. But in cases such as *Walker v. Lykes Bros. Steamship Co., supra,* and the present case, where the employer's claim against the officer would be only co-extensive with the claim of the officer against the employer, there is no reason for such circuity of action and the officer's breach of duty is treated simply as a defense.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

GRAYDON S. STARING,
One of Attorneys for Appellant.

(Appendix Follows)

Appendix.

Appendix

TABLE OF EXHIBITS

Libelant's Exhibits		Identified	Admitted
1	Certificates of discharge on various ships	6	6
2	Crew pay voucher	9	10
3	Crew pay voucher indicating unearned wages	11	11
4	Injury Report	24	24
5	Handwritten report of R. E. Rutledge	25	—
6	Peekskill Hospital Records	28	28
7	San Pedro Hospital Records	31	31
8	Statement of patient's treatment at PHS	33	33
9	Photostatic copies PHSH records	35	35
10	Medical records of Dr. Frank Nolan	44	44
11	Dispatcher's card	53	53
12	Report by Dr. W. R. Anderson	54	54
13	Medical Report—Duty Status	55	
14	Medical Report—Duty Status 8/4	57	57
15	Medical Report—Duty Status 8/15	58	58
16	Medical Report—Duty Status 12/22	64	64
17	Medical Report—Duty Status 3/18	69	69
18	Incidental medical and hospital expenses	72	72
19	Compilation of in and outpatient hospital time	73	73
20	Deposition of Dr. Gibbons	116	116
Respondent's Exhibits			
A	Telegram	76	76
B	Photograph	84	260
C	Photograph	86	260
D	Photograph	89	260
E	Photograph	94	260
F	Photograph	97	260